ANDRE DAS

v.

NASHARUDDIN AIDID

HIGH COURT MALAYA, IPOH
CHIN FOOK YEN J
[CIVIL APPEAL NO: 11-20-1995]
23 FEBRUARY 2000

CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside of default judgment given earlier on the same day - Whether magistrate was functus officio - Whether a written application necessary to set aside default judgment*

This was the appellant's appeal against the decision of the magistrate who allowed an oral application to set aside a default judgment made on the same day that the said judgment was given in favour of the appellant. The appellant claimed, *inter alia,* that the learned magistrate was *functus officio* upon entering the said default judgment and that there was a breach of O. 29 r. 14 of the Subordinate Courts Rules 1980 ('SCR').

Held:

[1] The magistrate was perfectly within her power, as a presiding officer, to recall her own order given earlier, on the same day, as here, before the court had arisen for the day, to change, vary or set aside the order.

[2] The magistrate certainly was not *functus officio* since it was a judgment by default entered in the absence of the defendant without trial or hearing and the judgment was far from being completed.

[3] A written application is only necessary under O. 29 r. 14 SCR where a judgment is formally completed, meaning having entered and drawn up. Otherwise, service thereof could not be effected and acknowledged received.

[4] The magistrate could recall her earlier order on the same day and set it aside, whether on her own or upon application, as she was still not *functus officio* at that time. She could do so without the necessity of a formal application in writing.

Obiter

[1] The claim being only RM1,100 should have been filed under the small claims procedure of O. 54 of the SCR.

[2] It would not do justice to the parties, where the defendant had admitted the claim, to dismiss the entire action. A dispensation of all formalities might not be unfair in view of the time consumed since 1994, if not already wasted. In the circumstances the better remedy would be to restore the case for hearing under O. 54 r. 16(2) SCR. The magistrate could proceed with the examination of the judgment debtor to consider the matter under r. 16(2)(b), a concession not to be taken as precedence.

[Appeal dismissed with costs.]

Case(s) referred to:
Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***
Lim Yam Teck v. Lim Swee Chiang & Anor [1979] 1 MLJ 162 ***(refd)***
Ling Nam Rubber Works v. Leong Bee & Co (No 2) [1968] 1 MLJ 265 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 13
Subordinate Courts Rules 1980, O. 29 r. 14, O. 54 r. 16(2)(b)

For the appellant - Nathan; M/s Subra & Partners
For the respondent - Nasharuddin Aidid

Reported by AG Kalidas

JUDGMENT

Chin Fook Yen J:

This is an appeal by the plaintiff from the decision of the learned magistrate in allowing an application by the defendant to set aside a default judgment (JID) given in favour of the plaintiff. The events leading up to these proceedings are not disputed and can be simply stated below.

(1) On 26 May 1994 plaintiff commenced this action against the defendant claiming for a sum of RM1,100 being rentals with interest and costs.

(2) On 4 October 1994 the defendant entered appearance therein admitting the plaintiff's claim.

(3) (a) On 6 April 1995 when the case was called up for the first time the plaintiff was present but the defendant was absent and in his absence JID was entered against him.

(b) However, on the same day after the plaintiff had left, at about 10.30 a.m. the defendant appeared in court. Apparently upon his oral application, the JID entered earlier was then set aside by the learned magistrate in the absence of the plaintiff.

(c) Plaintiff's solicitors subsequently received a letter from the magistrate's court dated 6 April 1995 informing them of the fate of the JID. At the same time the court also informed them that the case had been fixed for mention on 13 April 1995 and the parties were required to attend on the mention date.

(4) On 13 April 1995, plaintiffs counsel appeared in court, but after being informed by the learned magistrate that she stood by her decision in setting aside the JID, the counsel decided to appeal against the setting aside decision.

On appeal before me, the objection of the plaintiff is two fold; (1) the learned magistrate was *functus officio* upon entering JID and (2) there was a breach of O. 29 r. 14 of the Subordinate Courts Rules 1980 (Sub Courts Rules). After hearing submission on both sides, I dismissed the appeal with costs. I did so holding the view that the learned magistrate was right in her decision in setting aside the JID. To my mind, the learned magistrate was perfectly within her power, as a presiding officer, to recall his or her own order given earlier, on the same day, as here, before the court had arisen for the day, to change, vary or set aside her own order. The answer to the plaintiff's objection is provided in *Hock Hua Bank Bhd v. Sahari Bin Murid* [1981] 1 MLJ 143, at p 144, where the Federal Court held that:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, ... **unless it is a judgment by default or made in the absence of a party at the trial or hearing**. (emphasis added).

In another Federal Court case of *Ling Nam Rubber Works v. Leong Bee & Co (No 2)* [1968] 1 MLJ 265, the Federal Court quoted with approval the judgment of Jenkins LJ in *In re Harrison's Share Under a Settlement*, when it held;

> that an order pronounced by the judge can always be withdrawn, or altered, or modified by him until it is drawn up, passed and entered " and that" when a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed.

Here it talked of judgments generally and did not confine to default judgments only. In the instant case, it was a judgment by default entered in the absence of the defendant without trial or hearing and, if I may add, the judgment was far from being formally completed. The learned magistrate concerned was, in my opinion, certainly not *functus officio*.

This brings me to O. 29 r. 14 of the Subordinate Courts Rules 1980 (Sub Courts Rules) which is almost identical to O. 42 r. 13 of the Rules of the High Court 1980.

O. 29 r. 14 reads:

> r. 14. Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

In my view r. 14 of the Sub Courts Rules talks of a judgment formally completed, meaning having it entered and drawn up, otherwise service thereof could not be effected and no receipt acknowledged. In the event a written application becomes necessary. It follows, therefore, that before it is formally completed, the court may entertain oral application to vary it, as the case may be. This view is in consonant with the authorities referred to.

In yet another case of *Lim Yam Teck v. Lim Swee Chiang & Anor* [1979] 1 MLJ 162, a motor vehicle accident case, after full trial, the judge dismissed the action with costs. Thereafter, the judge had this to say at p. 163:

> After I had dismissed this action and arisen from court as I was not too happy with the end result I gave the matter further consideration and I then took the view that I may not be justified in having come to the conclusion ...
>
> That same afternoon I directed my personal assistant to inform both counsel not to treat the matter as concluded and final as I would like to hear further submissions from them. I took the view that my earlier decision should be varied ...

In that case, even though the learned judge had given his decision and had arisen from court, yet when he was down from the bench and gave the matter a second thought, he decided to recall the matter on the very same afternoon for further submissions and consideration and subsequently he decided to change his decision. Basing on these authorities, I am of the view that there is nothing wrong for the learned magistrate to recall her earlier order on the same day and set aside her order, whether on her own or upon application, as she was still not *functus officio* at that time and she could do so without the necessity of a formal application in writing.

There is one observation I would like to make. In the instant case, the claim, being only RM1,100, should have been filed under the small claims procedure of O. 54 of the Sub Courts Rules, the provisions of which would control the

entire action and from the Record of Appeal before me, O. 54 had been totally overlooked. It would not do justice to the parties, especially where, as here, the defendant had admitted the claim, to dismiss the entire action. A dispensation of all the formalities might not be unfair in view of the time consumed since 1994, if not already wasted. In the circumstances the better remedy would be to quickly restore the case for hearing under O. 54 r. 16(2). The magistrate could straight away proceed with the examination of the judgment debtor to consider the matter under r. 16(2)(b), a concession not to be taken as precedence.

For reasons aforesaid, the appeal is dismissed with costs. The magistrate shall proceed with the matter under O. 54 r. 16 of the Sub Courts Rules.